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Yap Boon Hwa v Kee Wah Soong

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-1068–05 OF 2018
BADARIAH SAHAMID, ZABARIAH YUSOF AND NOR BEE ARIFFIN JJCA
16 AUGUST 2019

C

Civil Procedure — Damages — Assessment of damages — Appeal against assessment by High Court judge — Whether High Court judge made erroneous assessment of damages to be awarded to defendant

D This was an appeal by the appellant ('the second plaintiff') against the decision of the learned High Court judge in assessment of damages in favour of the respondent ('defendant') in the sum of RM373,613.75 as damages for fraudulent misrepresentation committed by the second plaintiff on the
E defendant. The action by the plaintiffs in the High Court was for a declaration and/or order to cancel the share transfer form/Form 32A transferring 85% shares in Syarikat Nada Mewah Sdn Bhd ('Nada Mewah') to the defendant and for an order that the defendant transfer 85% shares in Nada Mewah to the plaintiff. The plaintiffs claimed the defendant had committed fraudulent
F misrepresentation by inducing him to sign a joint venture agreement ('D16') with the second plaintiff, with a view of getting handsome profits on the supposed placement of two development projects into Nada Mewah. The defendant counterclaimed against the plaintiffs for a refund of the monies paid to the plaintiffs and for damages for the loss of profits opportunity as a result of
G the fraudulent misrepresentation by the second plaintiff. The two projects were never placed into Nada Mewah. As such the learned High Court judge found that the second plaintiff had committed fraudulent misrepresentation against the defendant. Aggrieved by the decision of the learned High Court judge, the plaintiffs appealed to the Court of Appeal ('the liability appeal'). This court
H affirmed the decision of the High Court and further ordered that the defendant to pay to the plaintiffs the amount of RM300,000 for the balance of the price of Nada Mewah shares within 30 days of the order. This court remitted the case back to the High Court for assessment of damages for the fraudulent misrepresentation as the learned High Court judge failed to make any order for
I damages. The learned High Court judge granted the assessment of damages prayed for by the defendant as follows: (a) RM300,000 being the true loss had the defendant in fact paid for the acquisition of the shares; and (b) RM73,613.75 with interest at the rate of 5%pa from the date the suit was filed to the date of realisation as damages flowing from the misrepresentation

by the second plaintiff. Dissatisfied with the decision of the learned High Court judge, hence this appeal.

Held, allowing the appeal in part and setting aside the decision of the learned High Court judge:

(1) The learned High Court judge had erred as nowhere in the decision of the court in determining the liability appeal, was stated that the value of the shares was RM300,000, purported or otherwise. That amount was payment for the milestone achieved by parties as in D16, not the value of the shares. The learned High Court judge did not even consider whether the defendant derived benefits out of the transfer of the shares to him, except to accept the submission of the defendant that there was no value to the shares, despite no valuation had been done to ascertain its value. Therefore, awarding the defendant RM300,000 as damages for the acquisition of the shares was not only erroneous but would result in unjust enrichment to the defendant (see paras 54 & 62–64).

(2) The defendant had not proven his actual damages as RM300,000. Therefore for the defendant to submit that the share was worthless due to the absence of projects, was nothing but an unsubstantiated assumption. The defendant failed to mitigate his losses after he decided to affirm D16 (see paras 65 & 68).

(3) The learned High Court judge erred when Her Ladyship applied the principle of set off to the amount to be paid by the defendant to the second plaintiff when she decided that the actual loss to the defendant for the purchase of the shares in Nada Mewah was the sum of RM300,000. This amount did not constitute the actual loss or damage by the defendant (see para 69).

(4) Whatever expenses incurred after the affirmation of the agreement subsequent to the discovery of the fraudulent misrepresentation, could no longer be treated as actual expenses or losses that was claimable as damages. This could not be actual or direct loss flowing from the fraudulent misrepresentation. The learned High Court judge failed to consider that if the payments were made by the company surely the loss was not incurred by the defendant, but by the company. There was no evidence shown before the court below that such payment by the company for the said items had been reimbursed by the defendant. The court could not be forced to accept any kind of reports to satisfy the claims by the defendant despite such reports being unreliable as the basis was wrong and not applicable for development which was more than two acres. It was trite law that the burden was on the claimant to provide credible basis for his claim. Hence the amount claimed under items 1–5 could not fall within actual loss suffered flowing from the fraudulent misrepresentation. However, there was sufficient reason in respect of legal

A fees incurred by the defendant in defending the action of fraudulent misrepresentation. Hence, the court awarded the sum of RM600 + RM54,855.35 as damages that was due to the defendant (see paras 73–77 & 79).

B **[Bahasa Malaysia summary**

Ini adalah rayuan oleh perayu ('plaintif kedua') terhadap keputusan hakim Mahkamah Tinggi yang bijaksana dalam menilai ganti rugi yang memihak kepada responden ('defendan') dengan jumlah sebanyak RM373,613.75 sebagai ganti rugi untuk salah nyata fraud yang dilakukan oleh plaintif kedua terhadap defendan. Tindakan oleh plaintif di Mahkamah Tinggi adalah untuk pengisytiharan dan/atau perintah untuk membatalkan borang pindahan saham/Borang 32A yang memindahkan 85% saham di Syarikat Nada Mewah Sdn Bhd ('Nada Mewah') kepada defendan dan untuk perintah bagi defendan memindahkan 85% saham dalam Nada Mewah kepada plaintif. Plaintif mendakwa defendan telah melakukan salah nyata fraud dengan mendorongnya untuk menandatangani perjanjian usahasama ('D16') dengan plaintif kedua, dengan tujuan untuk mendapatkan keuntungan yang menarik mengenai penempatan dua projek pembangunan kepada Nada Mewah. Defendan menuntut balas terhadap plaintif untuk bayaran balik wang yang dibayar kepada plaintif dan untuk ganti rugi untuk kehilangan peluang keuntungan akibat salah nyata fraud oleh plaintif kedua. Kedua-dua projek itu tidak pernah diletakkan kepada Nada Mewah. Oleh itu hakim Mahkamah Tinggi yang bijaksana mendapati plaintif kedua telah melakukan salah nyata fraud terhadap defendan. Terkilan dengan keputusan hakim Mahkamah Tinggi yang bijaksana, plaintif telah merayu kepada Mahkamah Rayuan ('rayuan liabiliti'). Mahkamah ini mengesahkan keputusan Mahkamah Tinggi dan selanjutnya memerintahkan defendan membayar kepada plaintif sebanyak RM300,000 untuk baki harga saham Nada Mewah dalam masa 30 hari daripada perintah itu. Mahkamah ini mengembalikan semula kes itu kepada Mahkamah Tinggi untuk penilaian ganti rugi atas salah nyata fraud kerana hakim Mahkamah Tinggi yang bijaksana gagal membuat sebarang perintah ganti rugi. Hakim Mahkamah Tinggi yang bijaksana memberikan penilaian ganti rugi yang dipohon oleh defendan sebagai berikut: (a) RM300,000 sebagai kerugian sebenar yang defendan telah bayar untuk pemerolehan saham; dan (b) RM73,613.75 dengan faedah pada kadar 5% setahun dari tarikh saman difailkan kepada tarikh realisasi sebagai ganti rugi yang disebabkan oleh salah nyata fraud oleh plaintif kedua. Tidak berpuas hati dengan keputusan hakim Mahkamah Tinggi yang bijaksana, oleh itu rayuan ini.

Diputuskan, membenarkan sebahagian daripada rayuan dan mengetepikan keputusan hakim Mahkamah Tinggi yang bijaksana:

(1) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf kerana tidak

terdapat dalam keputusan mahkamah dalam menentukan rayuan liabiliti, dinyatakan bahawa nilai saham itu adalah RM300,000, yang dikatakan atau sebaliknya. Amaun itu adalah bayaran untuk pencapaian yang dicapai oleh pihak-pihak dalam D16, bukan nilai saham. Hakim Mahkamah Tinggi yang bijaksana tidak pernah mempertimbangkan sama ada defendan memperoleh faedah daripada pemindahan saham kepadanya, kecuali untuk menerima hujahan defendan bahawa tidak terdapat nilai kepada saham itu, walaupun tidak ada penilaian yang telah dilakukan untuk memastikan nilainya. Oleh itu, memberi kepada defendan RM300,000 sebagai ganti rugi untuk pengambilalihan saham bukan sahaja salah tetapi akan menyebabkan pengkayaan tidak wajar kepada defendan (lihat perenggan 54 & 62–64).

(2) Defendan tidak membuktikan ganti rugi sebenarnya sebagai RM300,000. Oleh itu, bagi defendan untuk mengemukakan bahawa saham tersebut tidak bernilai kerana ketiadaan projek-projek, adalah tidak lain hanyalah anggapan yang tidak berasas. Defendan gagal mengurangkan kerugiannya setelah dia memutuskan untuk mengesahkan D16 (lihat perenggan 65 & 68).

(3) Hakim Mahkamah Tinggi yang bijaksana terkhilaf apabila Yang Arif menggunakan prinsip tolakan kepada jumlah yang akan dibayar oleh defendan kepada plaintif kedua apabila beliau memutuskan bahawa kerugian sebenar kepada defendan untuk pembelian saham di Nada Mewah adalah berjumlah RM300,000. Jumlah ini bukan merupakan kerugian sebenar atau ganti rugi oleh defendan (lihat perenggan 69).

(4) Apa sahaja perbelanjaan yang ditanggung selepas pengesahan perjanjian itu selepas penemuan salah nyata fraud, tidak lagi boleh dianggap sebagai perbelanjaan atau kerugian sebenar yang boleh dituntut sebagai ganti rugi. Ini tidak boleh menjadi kerugian sebenar atau langsung yang mengalir daripada salah nyata fraud. Hakim Mahkamah Tinggi yang bijaksana gagal mempertimbangkan jika pembayaran dilakukan oleh syarikat pasti kerugiannya tidak ditanggung oleh defendan, tetapi oleh syarikat. Tidak ada keterangan yang ditunjukkan di hadapan mahkamah bawahan bahawa bayaran oleh syarikat untuk item tersebut telah dibayar balik oleh defendan. Mahkamah tidak boleh dipaksa untuk menerima apa-apa jenis laporan untuk memenuhi tuntutan oleh defendan walaupun laporan tersebut tidak dapat dipercayai kerana asas adalah salah dan tidak terpakai untuk pembangunan yang lebih daripada dua ekar. Adalah undang-undang mantap bahawa beban adalah di atas pihak yang menuntut untuk memberikan asas yang boleh dipercayai untuk tuntutannya. Oleh itu, amaun yang dituntut di bawah perkara 1–5 tidak boleh jatuh di bawah kerugian sebenar yang ditanggung oleh salah nyata fraud. Walau bagaimanapun, terdapat sebab yang mencukupi berkenaan dengan yuran guaman yang ditanggung oleh defendan dalam membela

A tindakan salah nyata fraud. Oleh itu, mahkamah memberikan jumlah RM600 + RM54,855.35 sebagai ganti rugi yang perlu dibayar kepada defendan (lihat perenggan 73–77 & 79).]

Cases referred to

B *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal* [1999] 2 MLJ 500, CA (refd)

Doyle v Olby (Ironmongers) Ltd and others [1969] 2 WLR 673; [1969] EWCA Viv 2, CA (refd)

Newark Engineering (NZ) Ltd v Jenkin [1980] 1 NZLR 504, CA (refd)

C *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769; [1996] 3 WLR 1051, HL (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)

D **Legislation referred to**

Companies Regulations 1966 Form 32A

Appeal from: Suit No 22NCVC-294–09 of 2015 (High Court, Kuala E Lumpur)

Rajasundram a/l Ponnusami (Kamala Saraswathy a/p Kathirravellu with him) (Raja S Devan & Veni) for the appellant.

Avinder Singh Gill (AS Gill, Thong & Agnes) for the respondent.

F **Zabariah Yusof JCA:**

[1] The appeal before us is by the appellant/second plaintiff against the decision of the learned High Court judge dated 26 April 2018 in assessment of G damages in favour of the respondent/defendant in the sum of RM373,613.75 as damages for fraudulent misrepresentation committed by the appellant/second plaintiff on the respondent/defendant.

[2] After considering the written and oral submissions of parties, H unanimously we allowed the appeal in part. We allowed damages to the respondent/defendant, in the form of the claim for legal fees incurred in defending the action of fraudulent misrepresentation. The respondent/defendant is therefore entitled to the following (refer to grounds of judgment of the learned High Court judge at *RR Jld* 1 pp 31–32):

I (a) RM600 for item 7, witness fees; and

(b) RM54,855.35 for items 9–15 (refer to p 32 of the grounds of learned High Court judge. We were told that item 10 has a mistake in the dates, namely '3.3.2013' should read '3.3.2016').

Therefore we allowed the sum of RM600 + RM54,855.35 as damages that is due to the defendant.

We set aside the decision of the learned High Court judge in awarding RM373,613.55 as damages and substitute it with the amount of RM55,455.35 (RM600 + RM54,855.35).

We further ordered that each party to bear his own costs.

[3] In this judgment, parties will be referred to as they were, in the High Court.

BACKGROUND

[4] The action by the plaintiffs in the High Court (22NCC-294–09 of 2015) was for a declaration and/or order to cancel the share transfer form/Form 32A transferring 85% shares in Nada Mewah to the defendant and for an order that the defendant transfer 85% shares in Nada Mewah to the plaintiff. The plaintiffs claimed the defendant had committed fraudulent misrepresentation by inducing him to sign a joint venture agreement ('D16') with the second plaintiff, with a view of getting handsome profits on the supposed placement of two development projects, namely the Rawang Land Project and the 1 Prima Terengganu Project into Syarikat Nada Mewah Sdn Bhd ('Nada Mewah'). The defendant counterclaimed against the plaintiffs for a refund of the monies paid to the plaintiffs and for damages for the loss of profits opportunity as a result of the fraudulent misrepresentation by the second plaintiff.

[5] Both the plaintiffs held shares in Nada Mewah. The first plaintiff was holding shares on behalf of her brother, the second plaintiff. It is not disputed that the second plaintiff was the person in charge of the day to day running of the business of Nada Mewah.

[6] The second plaintiff and the defendant entered into D16 on 10 November 2014 wherein it was agreed that the second plaintiff was 'to sell 85% of Nada Mewah Sdn Bhd shares to Mr Kee Wah Soong and undertake to commence and complete the 1 Prima Terengganu Project and Rawang Land Project under Nada Mewah Sdn Bhd'.

[7] As the facts disclosed later, the two projects were never placed into Nada Mewah. As such the learned High Court judge found that the second plaintiff had committed fraudulent misrepresentation against the defendant, as the

A intention of the defendant entering into the joint venture agreement with the second plaintiff was because of the two projects which would be emplaced in Nada Mewah which would provide enormous profits to Nada Mewah.

B **[8]** Aggrieved by the decision of the learned High Court judge, the plaintiffs appealed to the Court of Appeal (the liability appeal).

[9] In the hearing of the liability appeal before this court, this court held that the phrase in D16 which states, 'to sell 85% of Nada Mewah Sdn Bhd shares to
C Mr Kee Wah Soong and undertake to commence and complete the 1 Prima Terengganu Project and Rawang Land Project under Nada Mewah Sdn Bhd' cannot be interpreted to mean that the agreement is merely for the sale of shares of Nada Mewah to the defendant. Without the two projects, there would not have been any transfer of the shares of the company. The transfer of the shares
D is merely co-incidental and secondary to the two projects, as the defendant had put in monies for Nada Mewah.

[10] As a result this court affirmed the decision of the High Court that there was fraudulent misrepresentation committed by the second plaintiff with
E regards to the placement of the two projects into Nada Mewah when D16 was entered into between the plaintiffs and the defendant. This court, at the liability appeal, further ordered that the defendant to pay to the plaintiffs the amount of RM300,000 for the balance of the price of Nada Mewah shares within 30 days of the order (the order for this amount to be paid is based on
F D16, which will be explained in due course in this judgment). This court remitted the case back to the High Court for assessment of damages for the fraudulent misrepresentation as the learned High Court judge failed to make any order for damages although the learned High Court judge did make a finding that the second plaintiff had committed fraudulent misrepresentation
G on the defendant.

[11] With that order of this court, parties proceeded for assessment of damages before the learned High Court judge.

H **[12]** The claim by the defendant for damages in the High Court is divided into two parts:

(a) costs of acquisition of the shares; and

I (b) other losses incurred in defending the suit and prosecuting the counterclaim. These other losses were categorised into five parts as follows:

(i) expenses incurred with the company secretary;

(ii) expenses incurred in meetings and travelling;

(iii) fees to witnesses;

(iv) professional fee to expert and quantity surveyor's opinion; and

(v) legal fees.

These other losses amounts to RM73,613.75.

[13] The learned High Court judge in the hearing of the assessment of damages found that the second plaintiff 'failed to disprove the defendant's claim of his losses and damages'. Hence the learned High Court judge granted the assessment of damages prayed for by the defendant as follows:

(a) RM300,000 being the true loss had the defendant in fact paid for the acquisition of the shares; and

(b) RM73,613.75 with interest at the rate of 5%pa from the date the suit was filed to the date of realisation as damages flowing from the misrepresentation by the second plaintiff.

[14] Dissatisfied with the decision of the learned High Court judge, the second plaintiff appealed to the Court of Appeal, which is the appeal before us.

THE FINDINGS BY THE LEARNED HIGH COURT JUDGE IN THE ASSESSMENT OF DAMAGES

[15] The learned High Court judge found that the defendant is entitled to the costs in acquiring the shares, the losses that have arisen because of the fraudulent misrepresentation and the consequential losses due to the fraudulent misrepresentation, whether forseeable or not.

[16] Based on the contract, D16 which was adduced during trial, the sale of the shares would only be completed upon the projects being placed in the company and a sum totaling RM680,000 being the price of 85% shares would then be paid by the defendant to the second plaintiff. The manner of payment is as stipulated at para C of exh D16. For convenience the said para C of D16 is reproduced below:

C) Payment of RM 680,000 in stages before increase of another RM 1.0 MIL capital.

1) Sign the form as commitment of Agreement ... RM20,000

2) Admit Kee Wah Soong and Chong Poh Leng as Directors of company RM48,000

3) Transfer of company shares and admit one moreDdirector and change of bank account to include Kee Wah Soong RM232,000

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4) Assignment letter on Prima Project to Nada Mewah Sdn Bhd RM120,000

5) Commencement of Prima Project Launch RM60,000

6) Rawang Land contract renewal RM200,000

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7) Additional RM1,000,000.00 upon (5) and (6) completed (within one month period)

The milestones in items 1–3 of para C of exh D16 was completed but
C items 4–6 have not at all been shown to exist as represented before the contract was entered between the second plaintiff and the defendant. Hence, the second plaintiff was found to have committed fraudulent misrepresentation after failing to fulfill items 4–6 of D16, namely to emplace the two projects into Nada Mewah. This court has affirmed this finding (refer to the grounds of
D judgment in the liability appeal in W-02(NCC)(W)-1286–07 of 2016).

[17] Premised on this schedule of payments at para C of D16, the learned High Court judge found that the minimum loss to the defendant is the price the defendant would have to pay for the shares being transferred to him,
E namely RM300,000. This, according to the learned High Court judge was consistent with the finding of this court in the liability appeal, that when the shares were transferred to the defendant, the amount that the defendant would have to pay is RM300,000 based on D16.

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[18] The learned High Court judge agreed with the submission of the defendant that the application of set off principle is to be applied as the payment that the defendant is due to make is in fact his loss in the acquisition of the shares. The RM300,000 represents the loss suffered by the defendant as
G the deal was for the second plaintiff to commence and complete both projects.

[19] Further the learned High Court judge also said in the grounds that by ordering the defendant to pay the second plaintiff RM300,000 and at the same time ordered that damages to be assessed in favour of the defendant for the
H fraudulent misrepresentation by the second plaintiff indicated that this court did not value the shares at RM300,000.

[20] The learned High Court judge rejected the argument by the second plaintiff that the defendant is buying the shares at a profit. It is clear from the
I defendant's testimony during the trial at the first instance that his sole intent of entering into the contract is to make profit from the projects supposedly to be placed in the company. As such, the RM300,000 cannot be costs of shares at a profit, but it is the costs of his acquisition of the shares. The learned High Court judge held that:

the actual damage flowing from the contract is necessarily the loss minus the costs of acquisition which is now based on RM300,000 due to the second plaintiff's fraudulent misrepresentation and to place the projects into the company causing the company's shares to be in actual fact of no value.

[21] The learned High Court judge found that there is no issue of buying the shares at a profit. There is no evidence adduced to show what was the market value of the shares or that it is indeed RM300,000. But there are evidence to show that the company would not have 85% of its shares at RM300,000 or RM680,000 for that matter in the open market without those projects. If the RM300,000 ordered by this court at the liability appeal, for the defendant to pay the second plaintiff is to be considered as a discounted price of the shares in the open market, this court would not have ordered for damages to be assessed in favour of the defendant.

[22] With regards to other losses, the defendant's claim amounts to RM73,613.55 which comprise namely of company secretarial's fees which have been incurred in relation to the increase of capital and change of bank signatories to transfer the sum of RM200,000 back to the defendant's account, which had already been banked into the company's accounts earlier. The learned High Court judge found that there is sufficient evidence of the expenses incurred to the company secretary and other costs, established by the defendant.

[23] Apart from having to keep and maintain Nada Mewah after the shares were transferred to him, the defendant had to engage lawyers to defend him. Hence the expenses in the meetings and the travellings. The learned High Court judge accepted the defendant's argument that none of those would have happened and none of the expenses would have been incurred by him if not for the fraudulent misrepresentation committed by the second plaintiff.

[24] From the evidence, the legal fees in defending the suit by the plaintiffs was paid by Premier Property Sdn Bhd. The defendant is the shareholder of 99,999 shares in Premier Property Sdn Bhd whilst his wife owns one share. The learned High Court judge was of the view that the defendant owns and is the directing mind and will of Premier Property Sdn Bhd. The learned High Court judge rejected the argument by the second plaintiff that, as the legal fees was paid by Premier Property Sdn Bhd, the defendant did not suffer loss. The legal fees paid by Premier Property Sdn Bhd to the defendant's solicitors must have been paid at the behest and directive of the defendant. Having to defend the suit, to pursue the counterclaim, to prove the fraudulent misrepresentation of the second plaintiff and in bringing witnesses for the trial had resulted in the defendant having to incur legal expenses and fees. Hence such expenses are reasonable and recoverable.

A **[25]** On the allegation by the second plaintiff that the defendant failed to mitigate his losses from the time when he discovered the fraudulent misrepresentation; the reason as to why the defendant never returned the shares back to the second plaintiff upon discovery of the fraudulent misrepresentation was that, at the time when the suit against the defendant was filed by the B plaintiffs, the second plaintiff did not at any point in time seek for the return of those shares. The learned High Court judge further made findings that as the defendant had invested monies in Nada Mewah by purchasing its shares, notwithstanding the balance is outstanding at the material time, it is best for the defendant to make good of its acquisition as a majority shareholder and C director of Nada Mewah. Further, by offering the variation of the agreement, D16 through P11 and P14, in actual fact, the defendant was working on the pre-condition of the variation to the agreement to be fulfilled, which the second plaintiff failed to do.

D **[26]** As to the quantity surveyor's report from Mr Yang Onn How, which was based on the best scenario case, it shows that a profit on the Rawang Land Project nevertheless would be an impossibility. The 'SelangorKu' guideline is the best guideline and the best available comparison to be used that has put forth a scenario which best envisions the probable outcome. The learned High E Court judge said that it is safe to rely on Mr Yang Onn How's evidence and without giving other alternative to the trial court, the second plaintiff's attack on that particular evidence is without any merit.

F **[27]** The second plaintiff did not give evidence and hence whatever allegations he presented are without proof and is not safe to rely on. Many a time the second plaintiff attempted to revisit the issue of liability which had been adjudicated and affirmed by this court at the liability appeal.

G **[28]** Therefore the learned High Court judge found that the second plaintiff failed to disprove the defendant's claim of his losses and damages.

SUBMISSION BY THE SECOND PLAINTIFF

H **[29]** At the assessment of damages, the learned High Court judge decided that the actual sum of damages to the defendant was RM300,000. This amount was the payment the defendant was to pay the second plaintiff for the shares acquired and retained by the defendant. That was ordered by this court and the defendant had not made payment of those sum.

I (In this respect the defendant had earlier paid RM150,000 for the acquisition of the shares, however this sum was subsequently returned back to the plaintiffs. This was after the defendant had taken over Nada Mewah as the majority shareholder and was appointed as signatory to the bank accounts of

the company and he was the one who transferred the said amount from the accounts of the company back to himself). A

[30] No evidence was adduced to show what is the exact value of the shares at the time of the assessment proceedings in comparison to the value of the shares at the time the agreement, D16 was entered into. B

[31] The defendant need not pay the balance of RM380,000 as the projects had not come into Nada Mewah and now he is obliged to pay a sum of RM300,000 as consideration for the 85% shares in the company which is part of the contract between parties. C

[32] RM300,000 is not the loss incurred by the defendant as a result of the fraudulent misrepresentation. As the shares had been transferred to the defendant, the moment payment of RM300,000 has been made (if it has been made) the contract between the defendant and the second plaintiff ends there and then. No other performance can go on as the projects are no longer there. D

[33] The learned High Court judge erred in allowing the claim of RM300,000 as costs incurred by the defendant which is translated as damages in acquisition of the shares of the company when actually there has never been any payment made by the defendant for the acquisition of the 85% shares of Nada Mewah. E

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[34] On the purported expenses incurred by the defendant as a result of the fraudulent misrepresentation by the second plaintiff, the learned High Court judge had tabulated it in her grounds. For convenience we reproduced the Table of Expenses put up by the defendant herein below:

Description of Expense	Amount RM	Comment
1. Company Secretary Expense		
A. BQ Management consultants (3 July 2015)	718.40	Retainer fee and secretarial exercise and misc expenses
B. BQ Management consultants (7 July 2015)	3,400	Retainer fee and secretarial exercise and misc expenses
C. Monthly retainer fee to company secretary		
— Oct 2015–Sept 2016	960	12 x RM80
— Oct 2016–Sept 2017	960	12 x RM80
D. Monthly travelling printing and admin expenses		

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— Oct 2015–Sept 2016	360	12 x RM30
— Oct 2016–Sept 2017	360	12 x RM30
Sub Total	675.40	
Expenses on meetings/expenses, travelling		
5. Travelling to and from counsel office totaling more than 40 visits	4,000	Each visit RM100 inclusive of petrol & etc. 40 x RM100
6. Meeting with witness Leong Kheng Sun, Ahmad Fajjal and expert QS travelling expenses		
— Leong Kheng Sun	300	3 visits x RM100
— Ahmad Fajjal	600	6 visits x RM100
— Expert QS Meetings	500	5 visits x RM100
Sub Total	5,400	
7. Witness fees to witnesses		
— Leong Kheng Sun	300	
— Ahmad Fajjal	300	
Sub Total	600	
8. Professional fee to expert QS opinion	6,000	Receipt provided
Legal fee to counsel AS Gill Avinder		All receipts provided
9. REF: 1.K34.1966.15 (30 October 2015)	5,300	
10. REF: 1.K34.1966.15 (3 March 2013) (amended to 3 March 2015)	10,000	
11. REF: 1.K34.1966.15 (18 April 2016)	10,000	
12. REF: 1.K34.1966.15 (23 May 2016)	765	
13. REF: 1.K34.1966.15 (3 August 2016)	2,430	

14. REF: 1.K34.1966.15 (5 January 2017)	1,360	
15. REF: 1.K34.1966.15 (19 January 2017)	10,000	
16. REF: 1.K34.1966.15 (27 January 2017)	10,000	
17. REF: 1.K34.1966.15 (21 June 2017)	5,000	
Sub Total	54,855.35	
TOTAL	73,613.55	

On the expenses incurred by the company secretary: (refer to defendant's witness statements at Q and A No 7 at p 86 *RR Jld* 2A and notes of proceedings at p 129 and of the same *RR*:

(a) item 1: Expenses incurred by the company secretary:

(i) item (A) and (B) — there are no details of who paid for these expenses. These are memos issued by BQ Management Consultant with no proof of payment being made by the defendant or receipts being issued for those payments (if any); and

(ii) item (C) and (D) — there are no records of these payments being made for monthly retainer fee to the company secretary and monthly travelling expenses. There is also no receipts to support such payments.

Further, these items were accrued after the defendant had taken over Nada Mewah as the majority shareholder of the company and thereafter chose to keep the same at his own will. Therefore, the expenses to maintain and the daily running of the company should not be thrown against the second plaintiff;

(b) item 2: Expenses on meetings, travelling expenses:

there are no records of payments of these expenses anywhere in the defendant's bundle of documents, affidavits or witness statements to show proof of these expenses.

(c) item 3: Witness fee:

refer to pp 383–384 of *RR Jld* 2C, payments were advanced by a company called Premier Property Sdn Bhd which is not a party to the present suit. There is no resolution of the company to show that the defendant had authorised the company to pay on his behalf. Neither is there any records before the court to show that the company has been reimbursed back by the defendant;

(d) item 4: Payment of professional fee to expert, quantity surveyor's opinion:

the original figure of RM10,000 was reduced to RM6,000 during cross-examination and it must be observed here no payments confirmation or receipt has been produced (refer to the notes of proceedings at lines 35–37 and lines 1–9 of pp 208–209 of *RR Jld* 2A); and

(e) item 5: Legal fee to counsel, AS Gill & Salina:

the documents in support are from pp 387–446 of *RR Jld* 2C. Again most of the payment were made by Premier Property Sdn Bhd which is not a party to the present suit.

The learned High Court judge allowed the above claims from items 1–5 as Her Ladyship was satisfied that all the expenses put forth by the defendant in the expenses list at p 371 of *RR Jld* 2C are all expenses incurred by the defendant in having to keep and maintain Nada Mewah.

[35] The defendant failed to discharge the burden to prove his claim of RM373, 613.75 being his loss in maintaining Nada Mewah. At all material times these expenses are mostly not validated and seems to be ordinary expenditure in running his business and maintaining the shares.

[36] The defendant failed to mitigate his loss when he had the opportunity as early as August 2015 (nine months after D16 was entered into) to return the 85% shares of the company, but the defendant still chose to retain the shares but failed to make payment for those shares and is now assessing his damages in 2017.

[37] In addition, even if those losses are claimable in an assessment of damages, it is nevertheless not claimable under the heading of damages in fraudulent misrepresentation simply for the fact that these losses are not losses consequential to the 'fraudulent misrepresentation'. In cases of fraudulent misrepresentation, the duty of the court is not to assess damages on the footing of breach of contract, ie to place the innocent party in the position as though the contract has been performed but on the footing that the contract has been rescinded ie to put the innocent party in the position he would have been, had he not relied on the fraudulent misrepresentation. The second plaintiff referred to this court's decision in *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal* [1999] 2 MLJ 500. The second plaintiff asserted that he had made all attempts to put the parties to the original position even before the institution of the case against the defendant. However, the defendant failed to respond which resulted in the plaintiffs instituting the suit against the defendant.

[38] The learned High Court judge had erred in fact and law in deciding that RM300,000 is the loss he had incurred as a result of fraudulent misrepresentation. This is misconceived because RM300,000 is the sum the defendant is obliged to pay after the third milestone pursuant to the agreement, D16, which happened to be after the transfer of Nada Mewah's shares.

[39] The learned High Court judge also erred in law and fact when Her Ladyship said that the defendant had successfully proven his claims and is thus entitled to the sum of RM73,613.75 as damages flowing from the fraudulent misrepresentation when the payment was not made by the defendant and there was no proof of such payment made by the defendant.

[40] Hence the second plaintiff submitted that appellate intervention is warranted at this juncture to reassess the damages that is due to the defendant as the learned High Court judge had made erroneous assessment of the damages to be awarded to the defendant.

SUBMISSION BY THE DEFENDANT

[41] Premised on the finding of this court in the liability appeal, it is clear that this court did not place any value on the shares but held that the sale of the shares was 'merely coincidental and secondary to the two projects, as the defendant had put in monies in Nada Mewah'.

[42] The argument by the second plaintiff that RM300,000 is the value of the shares and that the defendant had benefitted from the transfer of the same is a non-starter argument. The shares of the company with no assets, no business and dormant, to top it all with losses and negative balances cannot by any stretch of imagination be translated to confer any benefit upon the defendant when he accepted a transfer of the shares.

[43] Instead of benefitting, the defendant is saddled with further liabilities of keeping the company's registration running, paying secretarial fees, audit fees and any other fees or taxes without receiving a single cent of income from it. Hence it is only logical that the sum of RM300,000 ordered by this court in the liability appeal was the defendant's total costs of acquisition of the shares and for being appointed director plus deposit on execution.

[44] The learned High Court judge was correct in applying the principle of set off against the amount to be paid to the second plaintiff premised on the fact that the shares of Nada Mewah had no value. The principle was applied between the costs of acquisition and the damages accruing to the defendant. At the date of execution of the agreement, D16, Nada Mewah had no value as it was a dormant company and without any inherent value. That being the case,

A even the shares had no value. Therefore the second plaintiff's argument that the defendant had obtained the shares at a profit is clearly misconceived based on the aforesaid. The second plaintiff failed to provide evidence of value or market value of the shares. This burden is on the second plaintiff.

B **[45]** Given that there is no value in the shares and the costs of acquisition being RM300,000, the principle of set off is applicable and as such the learned High Court judge's decision was not plainly wrong in deciding that the damages for this part of the claim to the defendant is RM300,000.

C **[46]** On the claim for defending the suit and prosecuting the counterclaim and the quantity surveyor's fees and valuation of the purported Rawang land project, the learned High Court judge was correct in her analysis for allowing the claims. There were sufficient evidence of the expenses incurred to the company secretary and other costs listed in the table as alluded to by the learned
D High Court judge.

[47] The learned High Court judge was satisfied that apart from having to keep and maintain Nada Mewah after the shares were transferred to him, the
E defendant had to engage lawyers to defend him in the suit by the plaintiffs against him and in his prosecuting his counterclaim against the plaintiffs. He has to conduct meetings and travel to attend such meetings to prepare for his case. There is no necessity for the defendant to produce documents as the defendant is not traveling officially.

F **[48]** On the payment of the legal fees which was paid by Premier Property Sdn Bhd, it has been shown that the said company was under the control of the defendant as he is the shareholder of 99,999 shares and that his wife is the holder of one share of the company. Hence he is the controlling mind of
G Premier Property Sdn Bhd. Premised on the aforesaid, the learned High Court judge was correct in holding that the expenses are reasonable and are recoverable.

[49] On the allegation of the failure of the defendant to mitigate his losses,
H the defendant submitted that the learned High Court judge found that the fact that the defendant had by way of exhs P11 and P14 made attempts to save the agreement, D16, is clear evidence of an attempt to mitigate his losses, but this was foiled by the second plaintiff himself.

I **[50]** The challenge by the second plaintiff on the quantity surveyor's report was premised on 'SelangorKu' guidelines which, according to the second plaintiff cannot be applicable to the Rawang Land Project. The learned High Court judge had considered this point and held that as the second plaintiff did

not provide any other alternatives and that the report had assessed the pricing based on the number of units that could have been built and concluded that there would still be a loss. Hence, the report was the best reference based on the available evidence.

[51] Given the aforesaid, the learned High Court judge did not err nor was there any manifest error in her application of the law, in awarding the damages to the defendant.

OUR FINDINGS

[52] The assessment of damages undertaken by the learned High Court judge was after the case was remitted back to the High Court by this court when allowing the defendant's appeal against the error by the learned High Court judge in failing to make an order of damages after making a finding that the second plaintiff was liable in fraudulent misrepresentation on the defendant.

[53] This court in the hearing of the liability appeal had affirmed the finding on fraudulent misrepresentation on the part of the second plaintiff and ordered that the defendant is to pay the second plaintiff RM300,000 after the 85% shares in Nada Mewah had already been transferred to the defendant. This court had never valued the shares. The basis of the order in ordering the defendant to pay the RM300,000 was purely based on the contract terms as can be found in exh D16 which states the milestones and the payment to be effected by the defendant after each milestone. From the agreement D16, until the milestone at para 3 (refer to para 15 of this judgment where we have stated the milestones and the payments related thereto), the defendant is required to make payment of RM300,000. It is not disputed that the shares had been transferred to the defendant, the defendant had admitted and appointed directors to the company and there has been a change of the company's bank signatory to include the defendant, which completed the third milestone, whereby payment of RM300,000 ought to have been made. That is the reason why the payment was ordered to be made. The defendant could have chosen to return the shares after the discovery of the fraudulent misrepresentation, but he chose to keep them and get on with D16. Hence, it is only fair that he pay the amount of RM300,000 to the second plaintiff. Again we emphasised that this is not the value of the shares as there has been no valuation of the shares at any given time and neither can it be regarded as the true loss had the defendant paid for the acquisition of the shares. The contract had stipulated the payment schedule and the amount according to the milestones as agreed, and parties are bound by the same.

[54] The learned High Court judge in para 33 of her grounds said that when

assessing damages, she took into account the order of this court on the basis that since this was the purported value of the shares, this then was clearly the costs in acquisition of the defendant. Therefore the learned High Court judge made a finding that 'the actual damage flowing from the contract is necessarily the loss minus the cost of acquisition which is now based on RM300,000 due to the second plaintiff's fraudulent misrepresentation and his failure to place the projects into the company causing the company's shares to be in actual fact of no value'. Again we observed that the learned High Court judge had erred in her inference as nowhere in the decision of this court in determining the appeal on liability, was stated that the value of the shares was RM300,000, purported or otherwise.

[55] The learned High Court judge was also of the view that there is no issue of buying the shares at a profit due to Nada Mewah being a dormant company and without the two projects emplaced. On one hand the learned High Court judge admitted that there is no market value of the shares adduced to show that the shares are indeed RM300,000; on the other hand, Her Ladyship took into account the order of this court on the basis that since this was the purported value of the shares, this then was clearly the costs in acquisition of the shares by the defendant (refer to para 33 of her grounds). The valuation of the shares was never determined by this court as it was never an issue at the liability appeal. At that point in time the concern was on the reason why the defendant entered into D16 with the second plaintiff and the push factor appeared to be the two projects to be emplaced in Nada Mewah and the shares were part and parcel of the agreement, D16.

[56] The learned High Court judge further made a finding at para 35 of her grounds that:

> ... from the evidence adduced before this Court, it is clear that the company would not have 85% of its shares at RM 300,000 or RM 680,000 for that matter on the open market without the projects. *If the RM300,000 ordered by the Court of Appeal for the defendant to pay the second plaintiff is to be considered as a discounted price of the shares on the market price, the Court of Appeal would not have ordered for damages to be assessed in favour of the defendant.* (Emphasis added.)

which is correct. Here the learned High Court judge appeared to have understood that the value of the shares and the order of this court for assessment of damages for fraudulent misrepresentation are separate and distinct.

[57] This court arrived at the decision to order the payment of the RM300,000 by the defendant premised on the terms that parties must abide according to the milestone in D16 at para (C). Therefore, for the learned High Court judge to value the costs of acquisition of the shares premised on the order

by this court for the defendant to pay RM300,000 (which is the payment according to the milestones as a basis), is nothing but an erroneous assessment.

[58] The order for the damages to be assessed by this court is due to the fraudulent misrepresentation by the second plaintiff on the defendant, pure and simple, which has got nothing to do with the value of the shares and also nothing to do with the earlier order of this court ordering the defendant to pay RM300,000.

[59] The issue to be determined at the hearing of the assessment of damages is what is the amount of damages to award to the defendant due to the fraudulent misrepresentation committed by the second plaintiff on the defendant. Lord Denning in the English Court of Appeal case of *Doyle v Olby (Ironmongers) Ltd and others* [1969] 2 WLR 673; [1969] EWCA Viv 2 agreed with the House of Lords when he said that:

> In fraud, the defendant has been guilty of a deliberate wrong by inducing the Plaintiff to act to his detriment. *The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it.* In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damages *directly flowing from the fraudulent inducement.* (Emphasis added.)

Further, the House of Lords in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769; [1996] 3 WLR 1051 stated that:

> *Doyle v Olby (Ironmongers) Ltd* establishes four points. First the measure of damages where a contract has been induced by fraudulent misrepresentation is reparation for *all actual damage directly flowing* from (ie caused by) entering into the transaction ... (Emphasis added.)

[60] In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* the House of Lords held that:

> ... primary rule was that a victim of fraud was entitled to *compensation for all the actual loss, including consequential loss, directly flowing from the transaction induced by the deceit of the wrongdoer*. The normal method of calculating the loss caused by the deceit was prima facie the price paid less the real value of the subject matter of the sale as at the date of the transaction or acquisition by the plaintiff. (Emphasis added.)

In cases of inducement to purchase property as a result of fraudulent misrepresentation, the measure of damages is prima facie the difference

between the price paid and the fair value of the property at the time of purchase.

The New Zealand Court of Appeal case of *Newark Engineering (NZ) Ltd v Jenkin* [1980] 1 NZLR 504 explained this principle of ascertaining the measure of damages when it held that the measure of damages in fraudulent misrepresentation is the difference between the price paid and the fair value at the time of the purchase. To arrive at the fair value of the shares at the time of purchase there must be a valuation of the shares.

[61] The manner in assessing the loss by the defendant is to compensate the defendant for the actual loss he suffered and consequential losses. First and foremost, the defendant must show that he suffered loss. If the defendant alleged that he suffered loss due to his acquisition of the shares, there must be an exact value of the shares at the time the defendant paid for the shares.

[62] The learned High Court judge held that the defendant had proven his losses as RM300,000, as that is the price he would have to pay for the purchase of 850,000 shares in Nada Mewah. Here, we found the learned High Court judge had erred. RM300,000 is not the value of the shares. As stated aforesaid, that amount is payment for the milestone achieved by parties as in D16, not the value of the shares. It is to be noted that from the milestone in D16, not only was the defendant landed with the 85% shares of Nada Mewah (of which he did not pay a cent), he also got to admit himself and two other directors of his choice to Nada Mewah and included himself as signatory to the bank accounts of Nada Mewah. He also included himself as majority shareholder and having the control of Nada Mewah. Hence the amount of RM300,000 cannot possibility be the value of the shares. In addition, the defendant is only entitled to claim for actual and consequential damages if and only if he had paid for the shares in the first place, which in our case, he had not done so. Even assuming that it is true as what the defendant claimed that the value of the 85% shares are RM300,000, then it does not make sense for D16 to provide for payment of RM680,000 for the purchase price.

[63] In a claim for damages, we are guided by *Doyle v Olby* where the court had stated that '... He is entitled to damages for all his loss, subject, of course to giving credit for any benefit that he has received ...'. Hence the defendant is only entitled to his damages after the determination of his loss after deducting the benefits he had received. It is not in doubt that in the present case the defendant had retained the 85% shares of Nada Mewah and he has not paid for it. Putting aside the fact that the defendant had not paid the amount of RM300,000 according to the milestone, the fact that the defendant has retained the shares, admitted himself and two others of his choice as directors of the company, and putting himself as signatory to the bank accounts of Nada

Mewah, shows that he has derived some benefits. In addition, it cannot be said that the 85% shares has zero value as there has not been any valuation of the shares at any given time. Therefore, for the learned High Court judge to hold that the defendant's loss is RM300,000 as the loss suffered by the defendant in acquiring the 85% shares, is erroneous, what more in the instant case, when the defendant has not paid for the shares, but retained the shares. The learned High Court judge did not even consider whether the defendant derived benefits out of the transfer of the shares to him, except to accept the submission of the defendant that there is no value to the shares, despite no valuation has been done to ascertain its value.

[64] Therefore, we agree with the submission by the second plaintiff that awarding the defendant RM300,000 as damages for the acquisition of the shares is not only erroneous but would result in unjust enrichment to the defendant. It would be a different situation had the agreement, D16 been rescinded (as the choice was with the defendant) and the shares are returned to the second plaintiff. As the defendant had elected to retain the shares and not rescind the agreement, surely he must make payment for them. He cannot be keeping the shares and not make payment, as that would be the effect of the learned High Court judge's decision in awarding RM300,000 as damages for the acquisition of the shares.

[65] Hence, we found that the defendant had not proven his actual damages as RM300,000. At the outset, the defendant does not have the exact figure as to how much damages he is claiming and is throwing the figures to the court to decide on his entitlement. There is no exact value of the shares as at the date of the assessment of damages. Therefore for the defendant to submit that the share is worthless due to the absence of projects, is nothing but an unsubstantiated assumption.

[66] We base our assessment on the case of *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal*, whereby this court highlighted that in fraudulent misrepresentation the assessment of damages is to put the innocent party in the position he would have been had he not relied on the fraudulent misrepresentation. The facts show that the second plaintiff had taken all attempts to put the parties to the original position before the fraudulent misrepresentation even before the institution of the suit against the defendant by the plaintiffs, namely for the return of the shares. There has never been any payment of the shares in the first place. However, the defendant did not respond. The agreement, D16 could have ended then, however the defendant chose to affirm the agreement instead.

[67] The moment the payment of RM300,000 has been made, the contract between the second plaintiff and the defendant ends then. No other

A performance can go on as it is known to the defendant that the two projects had never been emplaced with Nada Mewah.

[68] The defendant decided to affirm D16, and to keep the shares, even after discovering the fraudulent misrepresentation. After deciding to affirm the agreement, D16, the defendant did not take the necessary action/steps to revive the Rawang land project despite being in full control of Nada Mewah being a majority shareholder, as his directors had been appointed at that point in time and that he is already the signatory of Nada Mewah's account. With this factual matrix as background, can the defendant say that he suffered losses after the point when he chose to keep the shares even after knowing of the fraud and after knowing that the two projects had never been and are not emplaced in the Nada Mewah? We thus see merits in the argument of the second plaintiff that the defendant failed to mitigate his losses after he decided to affirm the agreement, D16. After affirmation, it lies with the defendant to carry out the necessary actions to revive the Rawang land project. The defendant can no longer put the blame on the second plaintiff for his failure (the defendant's) to steer Nada Mewah out of its dormancy, as he was the one who chose to continue with D16 (with variations as in P11 and P14), presumably being confident that he could revive the Rawang land project.

[69] As the learned High Court judge had erred in awarding RM300,000 as damages due to the costs of acquisition of the shares, we are of the view that the learned High Court judge equally erred when Her Ladyship applied the principle of set off to the amount to be paid by the defendant to the second plaintiff when she decided that the actual loss to the defendant for the purchase of the shares in Nada Mewah is the sum of RM300,000. This amount does not constitute the actual loss or damage by the defendant.

[70] The other claim by the defendant is the other losses incurred in defending the suit by the plaintiffs and prosecuting his counterclaim against the plaintiffs. These other losses are categorised into five parts as follows:

(a) expenses incurred with the company secretary;

(b) expenses incurred in meetings and travelling;

(c) fees to witnesses;

(d) professional fee to expert and quantity surveyor's opinion; and

(e) legal fees.

These other claims amounts to RM73,613.75.

[71] The learned High Court judge awarded the amount of RM73,613.75

claimed. The sum that was awarded by the learned High Court judge comprise the following two broad categories (refer to p 18 of the grounds of judgment at *RR Jld* 1):

(a) the company secretarial services of the BQ Management Consultant (item 1–4); and

(b) expenses on meetings, travelling by the company secretary (item 5).

The company secretarial expenses comprise of the retainer fee of the company secretary and miscellaneous expenses thereof, monthly retainer fee and the monthly travelling printing and administrative expenses.

[72] The expenses in items 1–5 were incurred well after knowledge of the fraudulent misrepresentation by the defendant, namely from October 2015–September 2017.

[73] After the discovery of the fraudulent misrepresentation by the defendant, the second plaintiff had made attempts to put parties back to their original position by demanding the return of the shares and made an offer to pay back the money received. In fact in the hearing of the appeal on liability, the facts show that the plaintiffs through their solicitors issued a demand letter dated 19 August 2015 demanding for the return of the shares to the first plaintiff (refer to the grounds of judgment of this court at p 38, para 80 in *RRT*). However, the defendant failed to respond. At this stage even after the discovery of the fraudulent misrepresentation, the defendant elected to affirm the agreement, D16 and the defendant's representatives had been admitted as directors, in accordance with the milestones as stipulated in the agreement. The defendant could have backed out from D16 at that point in time but he elected to affirm and continue with the agreement by providing a variation to D16 as in P11 and P14. Therefore, whatever expenses incurred after the affirmation of the agreement subsequent to the discovery of the fraudulent misrepresentation, can no longer be treated as actual expenses or losses that is claimable as damages. This cannot be actual or direct loss flowing from the fraudulent misrepresentation. After the affirmation and the election to proceed with D16, it is the statutory duty of the defendant to maintain Nada Mewah. If we are to agree with the argument of the defendant, then it would appear that the damages or loss incurred by the defendant to be imposed on the second plaintiff, would continue forever. That cannot be the case (refer to *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 at p 795 para H).

[74] It is to be observed that the expenses in items 3 and 5 were paid by Premier Property Sdn Bhd. The learned High Court judge held that since the defendant is the majority shareholder of the company he is the directing mind

of the company and that such payment would certainly be at the behest of the defendant (refer to para 33 of the grounds). The learned High Court judge failed to consider that if the payments were made by the company surely the loss is not incurred by the defendant, but by the company. There is no evidence shown before the court below that such payment by the company for the said items had been reimbursed by the defendant. Hence where is the actual loss by the defendant for these items. Expenses by the company cannot be expenses by the defendant. That is clearly erroneous. If one is to entertain such claim from an individual, more so in this case a shareholder when the payment was made by another company, there is the risk of double recovery, as there is nothing to stop Premier Property Sdn Bhd if it decides to make a claim against the second plaintiff in the future.

[75] The learned High Court judge further relied on the quantity surveyor's report to state that the Rawang land project is in actual fact a loss making project. However the learned High Court judge failed to appreciate that the quantity surveyor had already confirmed that the report was prepared based on the 'SelangorKu' guidelines which has yet to come into force and only applicable for development of land less than two acres. Clearly, it is not applicable to the Rawang land project in ascertaining whether there is a loss. Whatever findings in the report would be inaccurate and inapplicable to the Rawang land project. The learned High Court judge held that in the absence of any other comparables adduced by the second plaintiff, the court has no other choice but to accept the quantity surveyor's report. This, we found to be erroneous as it is always the burden on the claimant to prove his claim for damages with supporting evidence and credible valuation. It cannot be a situation where the defendant simply throws to the court any form of report or valuation which is not applicable to the case in question, especially in the present case, where the 'SelangorKu' guidelines is not applicable and not enforced yet. The court cannot be forced to accept any kind of reports to satisfy the claims by the defendant despite such reports being unreliable as the basis is wrong and not applicable for development which is more than two acres. It is trite law that the burden is on the claimant to provide credible basis for his claim.

[76] Hence this amount claimed under items 1–5 cannot fall within actual loss suffered flowing from the fraudulent misrepresentation.

[77] However, we find there is sufficient reason in respect of legal fees incurred by the defendant in defending the action of fraudulent misrepresentation. Given the aforesaid, the defendant is entitled to:

(a) item 7, namely witness fee to witnesses, Leong Kheng Sun and Ahmad Fajjal for a total sum of RM600 (refer to p 19 of the learned High Court judge's grounds of judgment in *RR Jld* 1);

(b) items 9–15, namely legal fee to counsel AS Gill Avinder in the amount of RM54,855.35 (refer to p 20 of the learned High Court judge's grounds of judgment in *RR Jld* 1).

[78] The defendant submitted that the second plaintiff did not testify hence his contention is not proven. However, it should always be borne in mind that the burden has always been on the claimant to prove his claim. Failure in doing so, regardless whether the second plaintiff failed to testify on the stand does not mean that the claim by the defendant is indeed proven.

[79] Given the aforesaid, we allowed damages to the respondent/defendant, in the form of the claim for legal fees incurred in defending the action of fraudulent misrepresentation. The respondent/defendant is therefore entitled to (refer to grounds of judgment of the learned High Court judge's grounds of judgment in *RR Jld* 1 pp 31–32):

(a) RM600 for item 7, witness fees; and

(b) RM54,855.35 for items 9–15 (refer to p 32 of the learned High Court judge's grounds of judgment. We were told that item 10 has a mistake in the dates, namely '3.3.2013' should read '3.3.2016').

We award the sum of RM600 + RM54,855.35 as damages that is due to the defendant.

[80] Therefore, unanimously we allowed the appeal in part. We set aside the decision of the learned High Court judge in awarding RM373,613.55 as damages and substitute it with the amount of RM55,455.35 (RM600 + RM54,855.35).

[81] Each party to bear his own costs.

Appeal allowed in part and decision of learned High Court judge set aside.

Reported by Nabilah Syahida Abdullah Salleh